No. 10290

United States
Circuit Court of Appeals
For the Ninth District.

JOHN WILLIAM WESTENRIDER,
Appellant,

-vs-

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

Upon Appeal from the United States District Court for the District of Nevada

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Citation of Authorities:

Corpus Juris Secudum, Vol. 22, P. 929, Sec. 605; U. S.-vs. Taliaferro, C. C. A., Cal. and 47 Federal 2nd, Page 699; State-vs. Blasengame, 61 Southern, Page 219; Also found in 1932 L. A. at Page 250.

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Appellant's Opening Brief

JURISDICTION

The defendant and one, Edgar L. Noble, were jointly indicted at the May, 1942 term of the United States District Court in and for the District of Nevada.

The jurisdiction of the trial court, United States District Court for the District of Nevada, was conferred by Sections 76 and 88 T. 18 U.S.C.A.

The jurisdiction of the above entitled court, to wit: The Circuit Court of Appeals in and for the Ninth District herein was conferred by Title 28, U.S.C., Section 225, Judicial Code, Section 128.

CONCISE STATEMENT OF CASE, QUESTIONS INVOLVED AND MANNER IN WHICH THEY ARE RAISED.

This is an action in which EDGAR L. NOBLE and JOHN WILLIAM WESTENRIDER, alias John Levi, were indicted in the Federal Court for the District of Nevada in the May term of said District Court for 1942 for violation of Section 76 and 88, Title 18, U.S.C.A. The defendant, Noble, had plead guilty to the charges in said indictment. Westenrider plead not guilty and was brought to trial before a jury in said Court on or about September 29, 1942, upon the plea of not guilty. Upon the final termination of the trial, the defendant was found guilty by the jury; the verdict being returned on September 30, 1942, being found guilty upon the first and second counts of said indictment. The time for sentence was fixed for October 6, 1942, at which time the Court entered its judgment and sentence; sentencing the defendant on the first count, to eighteen months, and on the second count, one year and one day; the sentences to run concurrently.

(See Record on Appeal, Pages 12 and 13, from which sentence this appeal is taken.)

Thereafter, a notice of Appeal to the Circuit Court of Appeals was filed and served.

(See Record on Appeal, Page 16.)

The grounds of appeal, as set out in said notice of appeal, were as follows:—

1. There was not sufficient evidence to submit to the jury as to any intent on the part of the defendant to commit the offense alleged in Count 1 of the Indictment, and/or as to any conspiracy on the part of the defendant to commit the offense above specified, and the Court should have dismissed the cause at the close of the Government's case or directed a verdict of not guilty at the close of the entire case.

2. The Government failed to prove any criminal intent on the part of the defendant.

3. The evidence adduced at the trial is as consistent with innocence as with guilt and is insufficient to sustain a conviction of the offenses alleged in the indictment or any crime at all.

Thereafter, upon filing a bond in the sum of $4,000.00 the defendant was released from custody and is now awaiting action of the Circuit Court of Appeals and is out under bond.

(See Record on Appeal, Page 20.)

Thereafter, the Bill of Exceptions and Settlement of Record of Appeal was agreed upon and settled by the court and a stipulation signed, which is attached to the Bill of Exceptions.

(See Record on Appeal, Page 29.)

ASSIGNMENT OF ERRORS

The errors relied upon by appellant are three in number, commencing on page 31 of the Record on Appeal.

Assignment No. 1 is as follows:

The Court erred in denying the Motion made on behalf of the defendant at the end of the Government's case for a direction of a verdict of "Not Guilty" on each and every count of the indictment upon the grounds that there was not sufficient evidence to warrant his conviction; that the Government had failed to prove facts sufficient to constitute a prima facie case, or the crime alleged in the indictment or any crime at all; that the Government had failed to prove any criminal intent on the part of the defendant; and that the evidence adduced on behalf of the Government was as consistent with innocence as with guilt, and was insufficient to sustain a conviction.

Assignment No. 2 is as follows:

The court erred in denying the motion made on behalf of the defendant at the end of the whole case for a direction of a verdict of "Not Guilty" on each and every count of the indictment upon the grounds that there was not sufficient evidence to warrant his conviction; that the Government had failed to prove facts sufficient to constitute a prima facie case, or the crime alleged in the indictment or any crime at all; that the Government had failed to prove any criminal intent on the part of the defendant; and that the evidence adduced on behalf of the Government was as consistent with innocence as with guilt, and was insufficient to sustain a convicton.

Assignment No. 3 is as follows:

The Court erred over objection and exception of defendant's

counsel in permitting on the direct-examination of David W. Elkin, the following question:

"Q. What was he doing there, if you know?

Mr. Hacker: Just a moment. I object to that line of questioning, upon the grounds it is incompetent, irrelevant, and immaterial, has no connection whatsoever with the issues in this case. The issue here is that this defendant represented himself to be a Government officer in June, 1942. Now what was he doing in Virginia City for a year prior to that, I fail to see where it is relevant in any respect whatever.

Mr. Thompson: I suggest, Your Honor—

Mr. Hacker: Now in that connection, if I may call the Court's attention to this fact—I don't know what the purpose of this examination is, whether to show he is a man of good character or a man of bad character, but if that is his purpose, it is wholly irrelevant because his character is not in issue until he puts it in issue. The Government will not be permitted to go into this man's prior life other than to ask if he has ever been convicted of a felony, and I would at least ask that the United States Attorney be required to state the object of this examination, his purpose.

Mr. Thompson: Well, if the Court please, I suggest that the evidence is very material on the question of whether or not this defendant, when he represented himself to be a Government officer, was an assumed character and what he was doing

just immediately prior to June 14, 1942 is very relevant on that issue.

The Court: I will permit the question, subject to conditions later. If it isn't connected, it may be stricken.

Mr. Hacker: I would like to make the further objection, if the Court please, upon the ground it is not the best evidence. If he wants to prove he is not a Government officer, the records of the government will prove that.

The Court: That objection will be overruled for the present.

Mr. Hacker: I desire an exception on the grounds stated in the objection.

The Court: Exception may be noted.

And by reason of said errors and other manifest errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

ARGUMENT

CITATIONS OF AUTHORITY

At the close of the Government's case, a motion was made for a directed verdict of "Not Guilty" on each and every count of the indictment, as appears in the Assignment of Error No. 1, which motion was by the Court denied. An examination

of the transcript of the Record on Appeal will disclose that the only evidence presented on the part of the Government as to the two counts in the indictment was confined to the testimony of Noble, one of the witnesses, and Elizabeth Lund, another of the witnesses, both of them accomplices in the alleged offense and co-conspirators thereto. There was absolutely no independent testimony or corroborating testimony offered by the Government except the testimony of these two witnesses.

It is a well recognized rule in all State Courts that a conviction of any person charged with a criminal offense cannot stand on the un-corroborated testimony of an accomplice or co-conspirator. It is true that in a Federal jurisdiction, the contrary has been held, but the jury is usually instructed in the language as follows:—

"The jury is instructed that in weighing the evidence all (in this case Edgar L. Noble) who is testifying for the Government, you should have due regard to the fact that he has pleaded guilty to the indictment, as well as of the fact of his being defendant, though not on trial. You are directed to weigh carefully his testimony and cautioned against placing too firm a reliance upon it, unless the same should be corroborated by testimony of witnesses other than principals or by other facts and circumstances that verify the testimony in material particulars."

This instruction was given and is in accordance with the decision rendered in the case of Orear vs. U. S., 261 F, Pages 257-260.

In this case now before the Court, there was no corroborating testimony, save and except that of one of the principals, Elizabeth Lund, at the time that this motion was made. Consequently, the Court should have granted the motion at the close of the Government's case and discharged the defendant and in not so doing, committed error as alleged in Assignment of Errors No. 1. It certainly cannot be denied that Elizabeth Lund was one of the principals in this entire transaction.

(See Transcript of Testimony commencing on Page 35 of Record On Appeal.)

ASSIGNMENT OF ERROR NO. 2

At the close of the entire case another motion was made for a directed verdict of not guilty on practically the same grounds as was made in Assignment No. 1. There was no further testimony introduced by the Government in support of the indictment and the only testimony presented was on the part of the defendant, Westenrider, which consisted of an express denial of all of the testimony given by the Government's witness with the exception that he was at the home of Mrs. Lund on two occasions.

(See Record on Appeal, Page 59.)

The motion for a directed verdict as constituting Assignment No. 2 was denied by the Court in its entirety.

It is a well known and universally recognized law that where a person is charged with a crime and the evidence adduced

and admitted at the trial is as consistent with his innocence as it is with his guilt, it is the duty of the jury to find such person not guilty; and we respectfully submit in support of the first and second Assignments of Errors that the evidence on the whole was as consistent with this defendant's innocence as it was with his guilt, and particularly in view of the fact that no corroborating testimony was offered or admitted outside of the testimony from the witness, Noble, and the witness, Mrs. Lund, who were, if any conspiracy at all existed, co-conspirators and principals in the entire transaction.

ASSIGNMENT OF ERROR NO. 3

This Assignment of Error No. 3 is based upon objections made by defendant's attorney to questions propounded to the witness, David W. Elkin, a witness presented by the Government.

(See Record on Appeal, Page 32.)

(Also for the full testimony of David W. Elkin, see Record on Appeal, Page 47.)

In the testimony of Elkin, it is self-evident and apparent that it was offered solely by the Government for the purpose of casting a suspicion upon the defendant, Westenrider, as a dissolute person and to arouse a prejudice in the minds of the jury against the defendant. It could have been done for no other purpose.

It will be observed, from the transcript of the Record on

Appeal, that the questions propounded to the Sheriff, Mr. Elkin, were propounded by the Government before the close of the Government's case, that the previous occupation of the defendant, Westenrider, was in no wise at issue in this trial. It was entirely immaterial and incompetent and the reason given by the District Attorney was a subterfuge after objections to the question, as propounded, "What was he doing there, if you know?"

(See Record on Appeal, Page 47.)

The Deputy United States Attorney stated to the Court:

"Well, if the Court please, I suggest that the evidence is very material on the question of whether or not this defendant, when he represented himself to be a government officer, was making a false representation, whether that was an assumed character and what he was doing just immediately prior to June 14, 1942, is very relevant on that issue."

(See Record on Appeal, Page 48.)

To which the Court stated:

"I will permit the question, subject to conditions later. If it isn't connected, it may be stricken."

Notwithstanding further objections, the Court permitted the witness, Elkin, to testify as to Westenrider's sojourn in Virginia City and what he was doing there, if anything.

(See Record on Appeal, Page 49.)

Such questions as were propounded to the witness, Elkin, are entirely immaterial and prejudicial when offered in the Government's case. They are permissible, at times, when offered by the defendant in order to establish his character for industry and other matters, but never, so far as we believe, is it admissible, by the Government.

In support of our position, we cite the Court to Corpus Juris Seccundum, Volume 22 at Page 929, Section 605, under the title, "Residence and Occupation of Accused", which is in part as follows, with the citations following thereto:

"Testimony as to the place of residence of defendant is germane, but his length of residence and his prior residence at other places are without pertinency. Some Courts hold that the occupation, past and present, of the accused in a criminal case are always admissible unless it is manifest that the purpose is to prejudice the jury against him, while others hold that such evidence is wholly irrelevant and inadmissible, and still other Courts hold that evidence of the previous occupation of the accused is admissible, if at all times it tends to establish good character."

Under this provision in the text, there are numerous citations in the note, particularly Notes 44, 45 and 46. Note 44 is a citation to U. S. vs. Taliaferro, C.C.A., Cal. and 47 Federal, 2nd 699. Note 45 cites the case of the State vs. Blasengame, 61 Southern, Page 219. Also found in 1932 L.A. at page 250, in which case the Court states the following:

"Where testimony concerning the occupations are connected

with the defendant in a criminal case is wholly irrelevant to the issue to be tried, and is likely to operate to his prejudice, its admission is reversible error."

A glance at the testimony of the witness, Elkin, as appears in the record, and the objections made thereto shows clearly that the testimony sought by the Government had no connection whatever with the charge contained in the indictment and it thus became absolutely irrelevant, incompetent and inadmissible, and it is very apparent that its only tendency would be to arouse suspicion in the minds of the jury derogatory to the defendant and thus tend to break down, in toto, his testimony relative to the transaction which, as stated, consisted solely in the denial of all of the testimony on the part of the Government. The very fact that the witness, Elkin, was a sheriff of Storey County in which Virginia City, Nevada, is situated, makes it very apparent that the purpose of the District Attorney in calling him was to cast a cloud upon the acts and conduct of the defendant, Westenrider. It would have more weight in casting such a cloud as, we refer to, than the testimony of any private individual. The mere fact that he was a sheriff would cause the jury to believe that he was a man of dissolute character and was under surveillance and suspicion on the part of the authorities.

We respectfully submit that in view of the record in this case and the connection of the witnesses with it, it should be reversed and remanded for a new trial.

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William L. Hacker

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M. B. Moore

Attorneys for Plaintiff.